

MEMORANDUM

S. 1210, a bill to amend the Freedom of Information Act (5 U.S.C. 552), is pending before the Subcommittee on Administrative Practice and Procedure. Senator Kennedy introduced the bill and held hearings on it on April 28 and 29, and June 12. The bill implicitly recognizes the right of a federal employee to disclose to any person information which is obtainable under the Freedom of Information Act (FOIA), and prohibits an agency from taking any adverse personnel action against an employee who so discloses. The bill does not make clear whether an employee must seek authorization from designated agency FOIA officials before releasing a document, or whether he can release a document predicated on his own belief that the document is not exempt from release.

The recent Freedom of Information Act amendments (P. L. 93-502) have dramatically increased the workload of federal agencies in dealing with these requests. CIA, for example, has found it necessary to assign over fifty of its employees to work full time handling FOIA requests. Numerous other Agency employees are also involved in processing these requests on less than a full-time basis. The one saving grace of the present law is that it permits agencies to centralize their handling of these requests, so that designated agency representatives determine what can be released, and what can and must be withheld. S. 1210, if interpreted to allow employees to reach their own decision on what can be released, would destroy this structure, and thereby destroy agency attempts to deal with the Freedom of Information Act in a methodical, organized manner.

If it is the intent of the bill to require an employee to obtain official screening and approval before releasing a document, such fact needs to be clearly stated in the bill. This would alleviate the major potential problem with the bill, but others would remain. These include:

1. Section 102(c) of the National Security Act of 1947 (50 U.S.C. 403) grants the Director of Central Intelligence the power to terminate the employment of any CIA employee when in his complete discretion, such termination would be necessary or advisable in the interests of the United States. The restriction in S. 1210 on adverse personnel actions is inconsistent with the statutory authority of the DCI.

2. The bill provides a perfect tool for disgruntled agency employees to work against their agency, rather than working from within to correct deficiencies as they see them. Also, under the guise of protecting employees from retributive agency action, the bill could subject employees to new pressures and impose very serious responsibilities on individuals who are without corresponding expertise. Investigative reporters and other outsiders could badger

employees to obtain and release documents. If employees may release documents when they personally believe them to be releasable under the FOIA, the bill would subject employees to substantial risks. If the employee releases materials which should have been withheld under FOIA, no protection is afforded employees. If the release amounts to a security violation, the consequences of the release could well be quite serious for the U. S. Government, and for the employee.

3. Section (f)(1)(B) establishes the right of employees to make any information whatsoever available to Members of Congress, even information protected from public disclosure under exceptions to the Freedom of Information Act. This section would frustrate and confuse orderly agency reports to Congress through prescribed channels. It would also contradict congressionally-established procedures of restricting access to sensitive intelligence information to the intelligence oversight subcommittees. Finally, it could create a major complication for the Director in discharging the responsibility placed upon him by the Congress to protect Intelligence Sources and Methods from unauthorized disclosure (50 U.S.C. 403).

4. Section 1(4) of the bill creates a presumption that any adverse personnel action taken against an employee within one year after that employee released information under FOIA is predicated on the release of the information. This section would readily lead to abuses, by encouraging employees who were in danger of adverse personnel action to release material, to gain unwarranted advantage of the presumption.